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THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION: COMMENCING A PROCEEDING IN NEW YORK FOR THE RETURN OF A CHILD ABDUCTED FROM A FOREIGN NATION

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*Prepared with the Assistance of L. Christopher Standora ***

I. INTRODUCTION

The Hague Convention on the Civil Aspects of International Child Abduction [hereinafter "Hague Convention" or "Convention"]¹ is an important legal mechanism for effectuating the return of a child internationally abducted by a parent or person alleging custodial rights. As international parental abductions escalate due to an increase in international travel, a rise in the number of marriages between residents of different countries, and a growth in the international divorce rate,² it has become increasingly

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¹ Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, at 1, 22514 U.N.T.S. at 98, *reprinted in* 51 Fed. Reg. 10493 (1986) [hereinafter Hague Convention].

² See Cara L. Finan, Comment, *Convention on the Rights of the Child: A Potentially Effective Remedy in Cases of International Child Abduction*, 34 SANTA CLARA L. REV. 1007, 1008 (1994) (commenting that the rise in international child abduction is attributed to bi-national marriages with

important for parents, legal practitioners, and the judiciary in the United States to become familiar with the Hague Convention and the relief it provides.³ This article intends to clarify the purpose of the Hague Convention and to offer guidance on petitioning the courts of New York for the return of a child abducted from a foreign nation and taken to New York. It also discusses the role of the Convention in securing the exercise of a noncustodial parent's visitation rights in New York and abroad. This article will not focus upon children who are abducted from New York and taken to a foreign nation, because in those cases, return petitions are to be adjudicated in the foreign nation and not in the courts of the United States.⁴

religious and cultural differences, international travel, and children with dual citizenship and two passports); Lawrence H. Stutter, *The Light at the End of the Tunnel: The Hague Convention on International Child Abduction has Reached Capitol Hill*, 9 HASTINGS INT'L & COMP. L. REV. 285, 300 (1986) (commenting that the increase in travel and international marriages have added a new dimension to child abduction); U.S. Dep't of Commerce, Statistical Abstract of the United States 265, 266 (1996) (reporting a steady increase in international travel to and from the United States from 1970 to 1994); 1994 *Demographic Yearbook*, Dep't for Economic and Social Information and Policy Analysis 559 United Nations, New York (1996) (finding that the international divorce rate has risen on the average since 1990).

³ Office of Children's Affairs, Overseas Citizens Services, Bureau of Consular Affairs, U.S. Dep't of State, Office of Children's Issue Statistics-1994 at 1 (1994) [hereinafter Office of Children's Issues Statistics]. According to the United States State Department, 762 Hague cases were filed in the United States in 1994. *Id.* Of these cases, 426 (or 57%) involved children abducted from the United States and 310 (or 43%) involved children abducted to the United States. *Id.* Mothers were the abductors in 63% of the cases and fathers were the abductors in 37% of the cases. *Id.*

⁴ See *infra* note 35 and accompanying text. For a thorough guide on domestic parental abductions and international parental abductions from the United States, see Patricia M. Hoff, *Parental Kidnapping: Prevention and Remedies*, The Parental Abduction Training and Dissemination Project, 1994 A.B.A. CENTER ON CHILDREN AND LAW (revised May, 1997).

II. THE BACKGROUND AND PURPOSE OF THE HAGUE CONVENTION

The Hague Convention was convened October 25, 1980 in the Hague, Netherlands.⁵ Its purpose is to provide for the prompt return of a child who was wrongfully removed to or retained in a country that is a signatory to the Convention [hereinafter "signatory"], by a person who intends to obtain physical or legal custody of that child abroad.⁶ It also aims to ensure that rights of custody and access to a child under the laws of one signatory are respected in other signatories.⁷ These purposes are to be accomplished by returning the child to the parent or custodian [hereinafter "petitioner"] with whom the child was residing prior to the abduction,⁸ regardless of the existence of a custody or visitation decree obtained by the abducting parent [hereinafter "respondent"].⁹

The Hague Convention was not devised to settle the merits of custody disputes between parties in different signatories or to award custody and visitation based upon the child's best interest.¹⁰ It was

⁵ Hague Convention, *supra* note 1, ch. VI, art. 45, T.I.A.S. No. 11,670, at 16, 22514 U.N.T.S. at 105; *see id.* T.I.A.S. No. 11,670, at 1 (stating that the treaty was entered into force on December 1, 1983 and the United States became a signatory on July 1, 1988).

⁶ *Id.* ch. I, art. 1(a), T.I.A.S. No. 11,670, at 4, 22514 U.N.T.S. at 98.

⁷ *Id.* ch. I, art. 1(b), T.I.A.S. No. 11,670, at 4, 22514 U.N.T.S. at 98; *see id.* ch. I, art. 5(a)-(b), T.I.A.S. No. 11,670, at 5, 22514 U.N.T.S. at 99 (defining custody and access). *See also* Hague International Child Abduction Convention, Legal Analysis by the Department of State, 51 Fed. Reg. 10493, 10513 (1986) [hereinafter Legal Analysis] (noting that the term "access" refers to visitation rights).

⁸ *Friedrich v. Friedrich*, 78 F.3d 1060, 1064 (6th Cir. 1996); *Feder v. Evans-Feder*, 63 F.3d 217, 221 (3d Cir. 1995); *Ryder v. Ryder*, 49 F.3d 369, 372 (8th Cir. 1995).

⁹ Hague Convention, *supra* note 1, ch. III, art. 17, T.I.A.S. No. 11,670, at 9, 22514 U.N.T.S. at 101.

¹⁰ Hague Convention, *supra* note 1, ch. III, art. 16, 19, T.I.A.S. No. 11,670, at 9, 22514 U.N.T.S. at 101; *Friedrich*, 78 F.3d at 1063; *Brooke v.*

designed to determine where a child should be physically located, so that the courts of the country where the child normally resides can make the proper custody determinations.¹¹ Nonetheless, as will be later discussed, the Convention gives the judiciary such broad discretion in determining whether to return a child to the petitioner that, in practice, the courts tread a delicate line between delving into the merits of a custody dispute and simply determining what is in the child's immediate physical and psychological interest.¹²

The Hague Convention was also not devised to compel the administrative or judicial authorities of the signatory to which the child was abducted [hereinafter "abducted-to signatory"] to recognize and enforce judgments and orders issued by the child's home country, or "habitual residence."¹³ Occasionally, petitions are filed in the New York courts for a writ of habeas corpus compelling a respondent in a foreign signatory to return an abducted child to New York. The courts of the abducted-to signatory, however, are under no obligation to recognize and enforce a writ of habeas corpus or any other New York judgments or orders. Whether they will accord recognition is, in the absence of an international instrument or laws in that signatory permitting such recognition, a matter of international comity.¹⁴

Willis, 907 F. Supp. 57, 59-60 (S.D.N.Y. 1995); *Currier v. Currier*, 845 F. Supp. 916, 920 (D.N.H. 1994); *In re David B. v. Helen O.*, 625 N.Y.S.2d 436, 437 (Fam. Ct. N.Y. County 1995).

¹¹ *Currier*, 845 F. Supp. at 920; *In re David B.*, 625 N.Y.S.2d at 437; *Loos v. Manuel*, 651 A.2d 1077, 1079 (N.J. Super. Ct. Ch. Div. 1994).

¹² See *infra* notes 115 – 156 and accompanying text (discussing the exercise of judicial discretion).

¹³ See *infra* notes 73 – 113 and accompanying text (discussing the meaning of "habitual residence").

¹⁴ BLACK'S LAW DICTIONARY 267 (6th ed. 1990). "[The] principle of 'comity' is that courts of one state or jurisdiction will give effect to laws and judicial decisions of another state or jurisdiction, not as a matter of obligation but out of deference and mutual respect." *Id.* See also *Societe Nationale Industrielle Aerospatiale v. United States Dist. Ct. for Southern Dist. of Iowa*, 482 U.S. 519, 544 n. 27 (1987) ("Comity refers to the spirit of cooperation in

The Hague Convention is also not an extradition treaty. It does not criminalize the wrongful removal of a child or interference with the visitation of a child; it provides a civil procedural remedy.¹⁵ It is solely concerned with the return of the child to the petitioner, not whether the respondent returns and faces punishment for his or her actions.¹⁶ Therefore, in the absence of an extradition treaty, an abducted-to signatory need not recognize another signatory's criminalization of a child's abduction and extradite the respondent.¹⁷

To date, forty-six countries have either ratified or acceded to the Convention.¹⁸ In order to be bound by the Convention, a signatory

which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states.").

¹⁵ Legal Analysis, *supra* note 7, at 10505.

¹⁶ See Hague Convention, *supra* note 1, ch. III, art. 12, T.I.A.S. No. 11,670, at 7-8, 22514 U.N.T.S. at 100 ("[T]he authority concerned shall order the return of the child forthwith."). (There is no provision for the return of the wrongdoer, which is the purpose of a criminal extradition).

¹⁷ Congress enacted the International Parental Kidnapping Act of 1993, [hereinafter IPKA] which criminalizes abductions from the United States and seeks the return of the abductor. See 18 U.S.C.A. § 1204 (Supp. 1996). It applies, however, only to children abducted from the United States, not to children abducted to the United States, and applies only where there are existing extradition treaties between the countries concerned. *Id.* See *infra* notes 29-34 and accompanying text.

¹⁸ Only nations that have ratified the Convention become signatories. See Hague Convention, *supra* note 1, ch. VI, art. 37-38, T.I.A.S. No. 11,670, at 13-14, 22514 U.N.T.S. at 104. Those who accede are obligated to observe the Convention only with respect to the countries that accept the accession. *Id.* ch. VI, art. 38, T.I.A.S. 11,670, at 14, 22514 U.N.T.S. at 104. As of April 1997, the following countries are parties to the Convention: Argentina, Australia, Austria, Bahamas, Belize, Bosnia-Herzegovina, Burkina Faso, Canada, Chile, Columbia, Croatia, Cyprus, Denmark (except Faroe Islands and Greenland), Ecuador, Finland, France, Germany, Greece, Honduras, Hungary, Iceland, Ireland, Israel, Italy, Luxembourg, Former Yugoslav Republic of Macedonia, Mauritius, Mexico, Monaco, Netherlands, New Zealand, Norway, Panama, Poland, Portugal, Romania, St. Kitts and Nevis, Slovenia, Spain, Sweden, Switzerland, United Kingdom of Great Britain, Northern Ireland, United States, Venezuela, and Zimbabwe. List obtained

must enact a domestic law that adopts the treaty and provides for its execution.¹⁹ The International Child Abduction Remedies Act of 1988 [hereinafter "ICARA"]²⁰ is the enabling legislation passed in the United States to establish procedures for executing the Convention and to empower the courts of the United States with the authority to adjudicate Convention petitions.²¹ ICARA sets forth notice and hearing requirements, delineates the burdens of proof that must be established by the parties involved, requires federal and state courts to accord full faith and credit to the judgments of other courts ordering or denying a child's return, and authorizes the use of interagency and governmental resources to locate an abducted child.²²

Any nonabducting "person, institution, or other body" that has exercised or would have exercised custody rights may employ the Convention and ICARA to effectuate the return of an abducted child only if he or she chooses.²³ The existence of the Convention and ICARA do not preclude a petitioner from invoking any other applicable law in a judicial or administrative forum in the United States and bypassing the Hague Convention and ICARA altogether.²⁴ The Convention and ICARA also do not preclude the

from U.S. Central Authority, Office of Children's Issues, U.S. Dep't of State, Room 4811, Washington, D.C. 20520.

¹⁹ See generally David McClean, *The Hague Child Abduction Convention - The Common Law Response*, 40 NETHERLANDS L. REV. 67 (1993); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt.h (1986).

²⁰ The International Child Abduction Remedies Act of 1988, 42 U.S.C.A. §§ 11601-11610 (1995) [hereinafter ICARA].

²¹ *Id.* §§ 11603, 11604.

²² *Id.* §§ 11603(c),(e),(g), 11606(d), 11608.

²³ Hague Convention, *supra* note 1, ch. III, art. 8, T.I.A.S. No. 11,670, at 6-7, 22514 U.N.T.S. at 100; 22 C.F.R. § 94.5 (1997). See ICARA, 42 U.S.C.A. § 11602(1) (stating that the petitioner must file an application to invoke the Convention's protection).

²⁴ Hague Convention, *supra* note 1, ch. III, art. 18, T.I.A.S. No. 11,670, at 9, 22514 U.N.T.S. at 101 (stating that the Convention does not preclude a judicial or administrative authority from ordering the return of a child at anytime), ch. V, art. 29, T.I.A.S. No. 11,670, at 12, 22514 U.N.T.S. at 103

use of any other international instrument in effect between the signatories involved.²⁵ However, when a petitioner invokes the Hague Convention and ICARA, their provisions supersede those of the Uniform Child Custody Jurisdiction Act [hereinafter "UCCJA"] in matters of international child abduction.²⁶ The UCCJA is a model domestic act that has been adopted by the individual states to deal with conflicting interstate jurisdiction over child custody matters.²⁷ Although the Convention and ICARA take precedence over the UCCJA,²⁸ provisions of the UCCJA relating to the recognition of foreign custody decrees, notice, and the opportunity to be heard are relied upon to carry out the Convention's mandates, as will later be discussed.

The Hague Convention and ICARA do not conflict with two federal statutes enacted to address parental kidnappings, the Parental Kidnapping Prevention Act of 1980 [hereinafter "PKPA"]²⁹ and the International Parental Kidnapping Act of 1993

(stating that a petitioner is not precluded from seeking the return of a child under laws other than the Convention); ICARA, 42 U.S.C.A. § 11603(h).

²⁵ Hague Convention, *supra* note 1, ch. V, art. 34, T.I.A.S. No. 11,670, at 13, 22514 U.N.T.S. at 103; ICARA, 42 U.S.C.A. § 11603(h) (stating that "[t]he remedies established by the Convention and this chapter shall be in addition to remedies available under other laws or international agreements.").

²⁶ *Duquette v. Tahan*, 600 A.2d 472, 477 (N.J. Super. Ct. App. Div. 1991); *Frost v. Frost*, No. FD-16-3525-91 (N.J. Super. Ct., Feb. 11, 1991). *See* ICARA, 42 U.S.C.A. § 11603(d) (stating that the petitions brought before the courts under the Convention are to be decided according to the Convention).

²⁷ Codified in New York under N.Y. DOM. REL. LAW §§ 75-a - 75-z (McKinney 1988) [hereinafter DRL]. The UCCJA may be extended to the international are not through DRL § 75-w.

²⁸ The Hague Convention and ICARA take precedence over the UCCJA pursuant to the Supremacy Clause of the United States Constitution. U.S. CONST. art VI, cl. 2 ("[T]he Laws of the United States . . . and all Treaties made . . . under the Authority of the United States, shall be the Supreme Law of the Land . . .").

²⁹ Parental Kidnapping Prevention Act of 1980, 28 U.S.C.A. § 1738A (1994) [hereinafter PKPA]. *See also* Crimes and Criminal Procedure Act, 18 U.S.C.A. § 1073 (Supp. 1996) (stating that flight to avoid prosecution or give

[hereinafter "IPKA"].³⁰ The PKPA was enacted to deal only with abductions within the United States and concerns the enforcement of custody decrees in one state that were previously granted by a court in another state.³¹ Since it does not require courts to give "full faith and credit" to foreign custody decrees, it is not a feasible option for an aggrieved parent whose child has been internationally abducted to or from the United States.³² The IPKA, which makes international parental abductions from the United States a federal crime, was intended to complement the Convention by providing that the United States may request extradition of a parent who abducted a child from the United States.³³ It does not, however, criminalize parental abductions to the United States. While the IPKA may encourage the United States to be more aggressive in pursuing international parental abductions of children from its own soil, the statute is limited because it applies only to countries that have extradition treaties with the United States.³⁴ Furthermore, it represents United States legislation, not international law. Therefore, foreign countries need not observe the legislation's directives.

testimony in cases such as domestic and international abductions from the United States constitutes a criminal act).

³⁰ IPKA, 18 U.S.C.A. § 1204.

³¹ PKPA, 28 U.S.C.A. § 1738A(a).

³² *Id.* "The appropriate authorities of every state shall enforce according to its terms, and shall not modify except as provided in subsection (f) of this section, any child custody determinations made consistently with the provisions of this section by a court of another state." *Id.*

³³ IPKA, 28 U.S.C.A. § 1204(a),(d).

³⁴ *See* EXTRADITION TREATY, Dec. 26, 1933, 49 Stat. 3111, 165 LNTS 45. This treaty lists the following countries as parties: Chile, Columbia, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama and the United States. *Id.*

III. PROCEEDING UNDER THE HAGUE CONVENTION AND ICARA

A. Where to File a Return Petition

The administrative or judicial authorities of the abducted-to signatory determines whether a child will be returned to his or her habitual residence.³⁵ Therefore, petitions for the return of a child abducted from New York must be initiated in the abducted-to signatory, not in New York, and petitions for the return of a child abducted to New York must be initiated in the courts of New York. There are several ways to initiate a return proceeding under the Hague Convention. Regardless of the procedure chosen, a petition should be filed promptly to prevent the respondent from

³⁵ See Hague Convention, *supra* note 1, ch. III, art. 12-15, T.I.A.S. No. 11,670, at 7-9, 22514 U.N.T.S. at 100-01 (indicating that the judicial or administrative authorities of the abducted-to signatory determine whether a child is to be returned); *Friedrich v. Friedrich*, 78 F.3d 1060, 1063 (6th Cir. 1996) (holding "[c]ourt in abducted-to nation has jurisdiction to decide merits of an abduction claim . . ."); *Feder v. Evans-Feder*, 63 F.3d 217, 222 (3d Cir. 1995) ("Any person seeking the return of a child under the Convention may commence a civil action . . . where the child is located."); *Rein v. Rein*, 1996 WL 273993, at *4 (S.D.N.Y. May 23, 1996) (finding that the United States did not have subject matter jurisdiction over return petition commenced pursuant to the Hague Convention because the child was abducted to England, therefore any claim must be brought there); *But see Roszkowski v. Roszkowska*, 644 A.2d 1150 (N.J. Super. Ch. Div. 1993); *See also Aubry v. Aubry*, N.Y. L.J., Sept. 16, 1991, at 31 (Sup. Ct. Suffolk County). In *Roszkowski*, the court ordered the respondent to return the child to New Jersey from Poland. *Roszkowski*, 644 A.2d at 1160. However, the court failed to recognize that, pursuant to the Convention, Poland should have been the jurisdiction determining whether the child should be returned to the United States. The Polish authorities do not have to recognize a New Jersey court order directing respondent to retrieve the child. In *Aubry*, the petitioner was granted temporary custody of a child located in Switzerland. *Aubry*, N.Y. L.J., Sept. 16, 1991, at 31. The respondent, who was also in Switzerland, was ordered by a New York court to return the child to the United States. *Id.* Switzerland, however, is under no obligation under the Convention to recognize and enforce a New York order.

adjudicating custody issues on the merits in the abducted-to signatory, and to prevent the child from "settling" into his or her new environment, which may minimize the opportunity for the child's return.³⁶

First, the petitioner may apply directly to the "Central Authority" located in the abducted-to signatory.³⁷ Every signatory to the Convention is required to establish a Central Authority to "discharge the duties which are imposed by the Convention" ³⁸ The Office of Children's Issues in the Bureau of Consular Affairs in the Department of State is the designated Central

³⁶ See Hague Convention, *supra* note 1, ch. III, art. 12, T.I.A.S. No. 11,670, at 7-8, 22514 U.N.T.S. at 100 (mandating that the child shall be returned in a proceeding commenced after one year unless "it is demonstrated that the child is now settled in its new environment"). See discussion *infra* notes 47-63 and accompanying text.

³⁷ *Id.* ch. III, art. 8, T.I.A.S. No. 11,670, at 6-7, 22514 U.N.T.S. at 100; ICARA, 42 U.S.C.A. § 11602(1).

³⁸ Hague Convention, *supra* note 1, ch. II, art. 6, T.I.A.S. No. 11,670, at 5, 22514 U.N.T.S. at 99. These duties include processing Convention applications, locating a child wrongfully removed or retained, preventing further harm or prejudice to the child by taking precautionary measures such as contacting the signatory's welfare agency to take action consistent with its abuse and neglect laws, and securing the voluntary return of the child. Furthermore, the Central Authorities are required to release the child's social background information, provide general information on the law of the signatory in connection to the petition, facilitate administrative or judicial proceedings concerning the child's safe return, provide legal aid and advice when required, keep the Central Authorities in other signatories updated with respect to the Convention, and eliminate obstacles to the application of the Convention. *Id.* ch. II, art. 7, T.I.A.S. No. 11,670, at 5-6, 22514 U.N.T.S. at 99, ch. III, art. 10, T.I.A.S. No. 11,670 at 7, 22514 U.N.T.S. at 100; ICARA, 42 U.S.C.A. at § 11608(a)-(c); 22 C.F.R. §§ 94.3, 94.6, 94.7 (1997). See ICARA, 42 U.S.C.A. § 11608(a)-(c) (stating that in order to locate abducted children, the United States Central Authority may use the field and tracking resources of government agencies and departments such as the Federal Bureau of Investigation, Internal Revenue Service, U.S. Attorney General, and U.S. Department of Education), §§ 11606(d), 11608(d) (noting that the Central Authority is also authorized to use the Parent Locator Service established under the Public Health and Welfare Act, 42 U.S.C.A. § 653 (1991)).

Authority in the United States.³⁹ A petitioner from a signatory who seeks the return of a child abducted to or retained in the United States may contact that office to begin the return process.⁴⁰ It should be noted that the U.S. Central Authority provides administrative assistance only. It "[i]s prohibited from acting as an agent or attorney or in any fiduciary capacity in legal proceedings arising under the Convention."⁴¹ It is also not responsible for the cost of legal representation, legal proceedings, or transportation expenses of the petitioner or child.⁴² Therefore, although a petition may be initiated in the U.S. Central Authority, the petitioner still must seek his or her own legal counsel in the United States and bear the cost of a legal proceeding. Nonetheless, the Central Authority, with its vast resources and expertise, provides the invaluable service of locating the child in a manner that may not be possible for the petitioner.

The petitioner may also apply to the Central Authority located in the child's habitual residence, and that Central Authority will refer the petition to the Central Authority located in the abducted-to signatory.⁴³ Thus, for a child taken to New York from a foreign signatory, a petition may be initiated with the Central Authority located in the foreign signatory and that Authority will refer the petition to the U.S. Central Authority for processing. For a child abducted from New York, a petition may be initiated with the U.S. Central Authority, which will forward the petition to the Central Authority located in abducted-to signatory, transmit pertinent information, and monitor the situation.⁴⁴

Finally, the petitioner may appeal directly to the courts of the abducted-to signatory to compel the return of the child to his or her

³⁹ ICARA, 42 U.S.C.A. § 11606; 22 C.F.R. § 94.2 (1997).

⁴⁰ 22 C.F.R. § 94.6 (1997).

⁴¹ 22 C.F.R. § 94.4 (1997).

⁴² *Id.*

⁴³ Hague Convention, *supra* note 1, ch. III, art. 8-9, T.I.A.S. No. 11,670, at 6-7, 22514 U.N.T.S. at 100; ICARA, 42 U.S.C.A. § 11602(1).

⁴⁴ 22 C.F.R. § 94.7 (1997).

habitual residence.⁴⁵ Articles 11 to 20 of the Hague Convention authorize the judicial and administrative authorities of the signatories to determine the rights of a petitioner and child under the Convention.⁴⁶ ICARA authorizes the courts of the United States to adjudicate petitions and take whatever measures are necessary under state and federal law to protect the child pending disposition of the petition.⁴⁷ In matters where a child has been wrongfully removed to or retained in the United States, a petitioner may bypass the U.S. Central Authority and apply directly to the federal district courts or the state courts.⁴⁸ Applying to the Central Authority or the courts is not mutually exclusive. A petitioner may apply to one or both simultaneously.⁴⁹

B. The Elements of a Hague Convention Return Petition

Besides providing the information required by the Hague Convention⁵⁰ and the Central Authorities,⁵¹ a return petition must

⁴⁵ Hague Convention, *supra* note 1, ch. V, art. 29, T.I.A.S. No. 11,670, at 12, 22514 U.N.T.S. at 103; ICARA, 42 U.S.C.A. § 11603(b).

⁴⁶ Hague Convention, *supra* note 1, ch. III, art. 11-20, T.I.A.S. No. 11,670, at 7-9, 22514 U.N.T.S. at 100-01.

⁴⁷ ICARA, 42 U.S.C.A §§ 11603(a), 11604(a). ICARA does not authorize administrative agencies in the United States to adjudicate Hague petitions.

⁴⁸ See ICARA, 42 U.S.C.A § 11603(a)-(b) (giving authority to commence civil action in courts). In New York, a petition may be filed in either Federal District Court, Family Court, or the New York State Supreme Court. The Family Court and New York State Supreme Court have concurrent jurisdiction over custody issues. See N.Y. Fam. Ct. Act §§ 651, 652 (McKinney 1983). See also *Mahmoud v. Mahmoud*, 1997 WL 43524, at * 1 (E.D.N.Y. Jan. 24, 1997) (holding that the Convention does not prohibit a respondent from moving a Hague proceeding from state court to federal court under the federal removal statute).

⁴⁹ Hague Convention, *supra* note 1, ch. III, art. 11, T.I.A.S. No. 11,670, at 7, 22514 U.N.T.S. at 100; 22 C.F.R. §§ 94.6(i), 94.7(b). Petitions are to be decided within six weeks, otherwise the petitioner or the Central Authority has the right to request a statement from the court explaining the reason for the delay.

⁵⁰ Hague Convention, *supra* note 1, ch. III, art. 8(a)-(g), T.I.A.S. No. 11,670, at 6-7, 22514 U.N.T.S. at 100.

satisfy several conditions prior to fully invoking the authority of the Convention. First, the child's habitual residence and the abducted-to signatory must be parties to the Convention in order for them to be bound by its mandates.⁵² Many countries have refused to sign the Convention based upon the belief that it would be in the best interest of the child to decide long-term custody issues in their own jurisdiction.⁵³ Nonsignatories may acquiesce to the Convention if they file a document of accession with the Ministry of Foreign Affairs in the Netherlands, but the accession is valid only against the signatories that accept the accession.⁵⁴ The Convention takes effect in a country only after that country signs and ratifies the

⁵¹ 22 C.F.R. § 94.5. See Hague Convention, *supra* note 1, ch. V, art. 27, T.I.A.S. No. 11,670, at 11, 22514 U.N.T.S. at 103 (stating that Central Authorities do not have to accept petitions that do not fulfill the Convention's requirements); see also *Id.* ch. V, art. 24; 22 C.F.R. § 94.5 (stating that the petitions initiated in the U.S. Central Authority must be in the form proscribed by the Central Authority and submitted in duplicate in English or with English translations, and petitions intended for use in a foreign country must have two additional copies in that country's foreign language); Hague Convention, *supra* note 1, ch. V, art. 30, T.I.A.S. No. 11,670, at 12, 22514 U.N.T.S. at 103; ICARA, 42 U.S.C.A. § 11605 (holding that authentication of petition, accompanying documents, or information is not required in order to be admissible in court).

⁵² Hague Convention, *supra* note 1, ch. V, art. 35, T.I.A.S. No. 11,670, at 13, 22514 U.N.T.S. at 103; see *Mezo v. Elmergawi*, 855 F. Supp. 59, 62-63 (E.D.N.Y.), *aff'd* 22 F.3d 1091 (2d Cir. 1994) (stating that the Hague petition dismissed because the countries to which the children were abducted, Libya and Egypt, were not signatories to the Convention); *In re Moshen v. Moshen*, 715 F. Supp. 1063, 1065 (D.Wyo. 1989) (wherein the petition was dismissed because the abducted-to country, Bahrain, was not a signatory to the Convention); *Ivaldi v. Ivaldi*, 672 A.2d 1226, 1232 (N.J. Super. Ct. App. Div. 1996) (holding that the court had no jurisdiction to entertain a return petition because Morocco was not a signatory to the Convention).

⁵³ See Dorothy Carol Daiole, Note, *Due Process Rights of Parents and Children in International Child Abductions: An Examination of the Hague Convention and Its Exceptions*, 26 VAND. J. TRANSNAT'L L. 865, 870 (1993).

⁵⁴ Hague Convention, *supra* note 1, ch. VI, art. 38, T.I.A.S. No. 11,670, at 14, 22514 U.N.T.S. at 104.

Convention, not from the date the Convention was originally convened.⁵⁵

Second, the petition must be commenced within one year of the date of the wrongful removal or retention in order for the courts of an abducted-to signatory to direct the return of the child.⁵⁶ If the petition is made after one year, the court still must order the child returned to the petitioner (assuming all the other Convention conditions are met) unless it can be shown that the child has settled into a new environment.⁵⁷ Obviously, a problem arises when a child cannot be located within one year of the abduction, subjecting the petitioner to this discretionary exception which may delay or prevent the child's return. The child must also be under the age of sixteen.⁵⁸ However, the Convention does not bar the use of other laws or procedures to effectuate the return of a child who is over the age of sixteen.⁵⁹

Third, the petitioner must establish that the country the child was abducted from is the child's habitual residence.⁶⁰ The courts of the habitual residence will determine the custody claim that underlies

⁵⁵ *Id.* ch. V, art. 35, T.I.A.S. No. 11,670, at 14, 22514 U.N.T.S. at 103, art. 43, T.I.A.S. No. 11,670 at 15, 22514 U.N.T.S. at 105. See *Koons v. Koons*, 161 Misc.2d 842, 615 N.Y.S.2d 563 (Sup. Ct. New York County 1994) (holding that Hague Convention could not be applied because child was abducted from Italy one month before Italy became a signatory).

⁵⁶ Hague Convention, *supra* note 1, ch. III, art. 12, T.I.A.S. No. 11,670, at 7-8, 22514 U.N.T.S. at 100; see *Slagenweit v. Slagenweit*, 841 F. Supp. 264, 270 (N.D. Iowa 1993) (holding that the one year period commences from the date the noncustodial parent asserts rights of custody).

⁵⁷ Hague Convention, *supra* note 1, ch. III, art. 12, T.I.A.S. No. 11,670, at 7-8, 22514 U.N.T.S. at 100.

⁵⁸ *Id.* ch. I, art. 4, T.I.A.S. No. 11,670, at 5, 22514 U.N.T.S. at 99; 22 C.F.R. § 94.1(c).

⁵⁹ Hague Convention, *supra* note 1, ch. III, art. 18, T.I.A.S. No. 11,670, at 9, 22514 U.N.T.S. at 101, ch. V, art. 29, T.I.A.S. No. 11,670, at 12, 22514 U.N.T.S. at 103, ch. V, art. 34, T.I.A.S. No. 11,670, at 13, 22514 U.N.T.S. at 103. These articles clearly indicate that the Convention is not the exclusive remedy to be utilized in international abduction cases.

⁶⁰ *Id.* ch. I, art. 4, T.I.A.S. No. 11,670, at 5, 22514 U.N.T.S. at 99.

the abduction.⁶¹ As will be discussed in the following section, establishing the child's habitual residence is the cornerstone of a successful return petition.

Finally, the petitioner must show, by a preponderance of the evidence, that the child was wrongfully removed from the habitual residence or wrongfully retained in the respondent's country.⁶² A removal or retention is wrongful under Article 3 of the Convention if it breaches the custody rights of a person or institution as defined by the laws of the child's habitual residence, and that at the time of the removal or retention, those rights were being exercised or would have been exercised but for the removal or retention.⁶³ Custody rights (held jointly or alone) may be established by either a legally binding agreement between the parties, by operation of the law of the child's habitual residence, or a custody decree.⁶⁴ Thus, unlike other treaties or domestic laws concerning child abduction,⁶⁵

⁶¹ Legal Analysis, *supra* note 7, at 1050; *Currier v. Currier*, 845 F. Supp. 916, 920 (D.N.H. 1994); *Tyska v. Tyska*, 503 N.W.2d 726, 728 (Mich. Ct. App. 1993).

⁶² Hague Convention, *supra* note 1, ch. I, art. 3, T.I.A.S. No. 11,670, at 4-5, 22514 U.N.T.S. at 98-99; ICARA, 42 U.S.C.A. § 11603 (e)(1)(A).

⁶³ Hague Convention, *supra* note 1, ch. I, art. 3, T.I.A.S. No. 11,670, at 4-5, 22514 U.N.T.S. at 98-99; *Brooke v. Willis*, 907 F. Supp. 57, 61-62 (S.D.N.Y. 1995). See *Friedrich*, 78 F.3d at 1066. For cases on the exercise of custody rights, see *Currier*, 845 F. Supp. at 921 (holding that the petitioner had the right of custody at time of children's removal pursuant to order issued by German court); *Meredith v. Meredith*, 759 F. Supp. 1432, 1435-36 (D. Ariz. 1991) (holding that the petitioner did not have legal custody at time of child's removal because she acquiesced to Arizona custody decree awarding respondent custody of child); *Loos v. Manuel*, 651 A.2d 1077, 1083 (N.J. Super. Ct. Ch. Div. 1994) (finding that under German law, foster parents were not exercising rights of custody at the time the natural mother removed child from Germany to New Jersey).

⁶⁴ Hague Convention, *supra* note 1, ch. I, art. 3, T.I.A.S. No. 11,670, at 4-5, 22514 U.N.T.S. at 98-99; *Brooke*, 907 F. Supp. at 61.

⁶⁵ See The European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children, May 20, 1980, 19 I.L.M. 273 (concerning the recognition and enforcement of child custody decrees issued by states that are parties to this Convention); PKPA, 28 U.S.C.A. § 1738A(a), (b)(3) (stating full faith and

a custody decree from the child's habitual residence is not required.⁶⁶

Prior to issuing an order for the return of the child, the courts of the abducted-to signatory may request an "Article 15" determination. Under Article 15 of the Convention, the courts may request that the petitioner "obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention"⁶⁷ In other words, the courts may request a determination establishing that the petitioner had custody rights at the time of the abduction pursuant to the laws of the child's habitual residence, and that these rights were breached by the abduction or retention. Thus, the New York courts may request an Article 15 determination from the courts of the child's habitual residence when adjudicating a return petition. Similarly, a petitioner whose child was removed from New York and taken to a foreign signatory may motion the New York courts for a determination of "wrongfulness" under the Convention.⁶⁸

Since a finding of custody rights is required for an Article 15 determination, a problem arises in countries that do not permit such

credit is to be accorded to child custody determinations); Missing Children's Assistance Act of 1984, 42 U.S.C.A. § 5772(1)(A) (1995) (defining a "missing child" as one removed from legal custodian without consent); DRL § 75-c(2) (finding that "custody determination" means court decisions and court orders providing for temporary or permanent custody of a child, including visitation rights).

⁶⁶ ICARA, 42 U.S.C.A. § 11603(f)(2). In the United States, a custody case is created for the purposes of the Hague Convention when any parent or custodian requests assistance from the U.S. Central Authority in an international custody dispute. In accordance with the Convention, a custodial decree or warrant is not necessary for the U.S. Central Authority to become involved. Office of Children's Issues Statistics, *supra* note 3, at 1.

⁶⁷ Hague Convention, *supra* note 1, ch. III, art. 15, T.I.A.S. No. 11,670, at 8-9, 22514 U.N.T.S. at 101; *see* ICARA 42 U.S.C.A. § 11603(f)(1) (defining the term "authorities" as used in Article 15 as referring to the appropriate court or agency of the child's habitual residence).

⁶⁸ *See* 22 C.F.R. § 94.7(d) ("[The Central Authority shall] upon request, facilitate efforts to obtain . . . a statement as to the wrongfulness of the taking of the child under the laws of the child's state of habitual residence.").

custody determinations to be made in the absence of the child and respondent. This situation would not be a problem where a child was abducted *to* New York. Nor would it be a problem where a child was abducted *from* New York because New York's UCCJA permits custody adjudications on the merits in the child's absence, as long as one of its jurisdictional prerequisites are met and reasonable notice and an opportunity to be heard is afforded to the respondent.⁶⁹ Thus, a New York court may issue a custody determination to the petitioner without the child being present. The custody determination, however, should contain an explicit finding of wrongful removal within the meaning of Article 3 of the Convention in order to satisfy the requirements of Article 15.

Another problem that arises under Article 15 is the length of time it may take to obtain a determination from either a New York or foreign court, which could significantly protract the disposition of a return petition. To expedite the return process, a New York court disposing of a return petition may forego an Article 15 request and take judicial notice of the laws of the child's habitual residence to determine whether a wrongful removal or retention has occurred.⁷⁰ Likewise, the courts of an abducted-to signatory disposing of a return petition may forego an Article 15 request and take judicial notice of New York State laws.

It must be emphasized that Article 3 requires only a showing that the petitioner had a right of custody or access at the time the child

⁶⁹ DRL §§ 75-d(1),(3), 75-e. There is also New York authority holding that ex parte temporary custody orders are permitted under extraordinary circumstances. See *Klam v. Klam*, 797 F. Supp. 202, 206 (E.D.N.Y. 1992) (holding that an ex parte temporary custody application will be entertained by the courts upon a showing of extraordinary circumstances); *Alberts v. Alberts*, 168 A.D.2d 1004, 564 N.Y.S.2d 945 (4th Dep't 1990) (holding an ex parte temporary custody order can be made only upon a showing of extraordinary circumstances).

⁷⁰ Hague Convention, *supra* note 1, ch. III, art. 14, T.I.A.S. No. 11,670, at 8, 22514 U.N.T.S. at 101; see *In re David S. v. Zamira S.*, 151 Misc.2d 630, 634, 574 N.Y.S.2d 429, 432 (Fam. Ct. Kings County 1991) (wherein the court took judicial notice of custody, access, and guardianship laws of Ontario, Canada and recognized Canadian decree giving petitioner temporary custody of children).

was removed or retained.⁷¹ It does not require the court to delve into the merits of the custody arrangement that existed at the time of the abduction or to modify custody rights post-abduction.⁷² Therefore, consideration of "wrongfulness" for the purposes of an Article 15 determination should be limited to the custody arrangement that existed immediately preceding the abduction. Consideration of the merits of a custodial arrangement post-abduction only undermines the goal of the Hague Convention to restore the factual custody status quo. The merits of a custody situation should be decided once the child is returned to his or her habitual residence and a hearing can be held with all the relevant parties present.

C. Habitual Residence: The Key to A Child's Return

Since the Convention was predicated upon the goal of returning internationally abducted children to the location where they normally reside, the most important fact a petitioner must establish is that the signatory from which the child was abducted is the child's habitual residence. It is the habitual residence that has the right, under the Convention, to determine any underlying custody disputes between the petitioner and the respondent.⁷³ Although the term "habitual residence" is not defined by the Hague Convention or ICARA, a definition has emerged from the New York courts.

Habitual residence was initially defined in New York in *In re Cohen v. Cohen*.⁷⁴ *Cohen* defined habitual residence in terms of the concept of "domicile," which centers on the intent of a person to reside in a particular place.⁷⁵ Applying this concept, the court

⁷¹ Hague Convention, *supra* note 1, ch. III, art. 3, T.I.A.S. No. 11,670, at 4, 22514 U.N.T.S. at 101.

⁷² *Id.*

⁷³ Legal Analysis, *supra* note 7, at 10507.

⁷⁴ 158 Misc.2d 1018, 602 N.Y.S.2d 994 (Sup. Ct. Kings County 1993).

⁷⁵ *Id.* at 1024, 602 N.Y.S.2d at 998. *Cohen* involved two young children with dual citizenship of both the United States of America and the State of Israel. *Id.* at 1020, 602 N.Y.S.2d at 995. The parents were married in Israel, and moved to Cleveland, Ohio, where their children were born. *Id.*

found that there was no intent on the part of the respondent to relocate her children to Israel, only a consent to the children visiting the petitioner in Israel. Thus, the court refused to order the children returned to Israel from the United States, finding that the parents intended the United States to be the children's habitual residence.

The *Cohen* approach, however, failed to recognize the difference between the concepts of domicile and residence. Residence requires only a bodily presence in a particular location, whereas domicile requires an intent to make that location one's fixed and permanent home.⁷⁶ Since a child's domicile is determined by the parent's domicile and intent,⁷⁷ there is a dilemma if the parent

The children were reared in Ohio by both parents, and after marital difficulties, by respondent alone in New York City until 1992, where an attempted reconciliation was made between petitioner and respondent. *Id.* In late Fall 1992, petitioner purchased one-way tickets to Israel for himself and the children. *Id.* Respondent maintained regular telephone contact with the children in Israel, while simultaneously seeking relief in the New York Courts for a determination of custody. *Id.* at 1020, 602 N.Y.S.2d at 996. Respondent went to Israel and with the assistance of the United States Embassy, obtained new passports for the children and took them back to the United States. *Id.* at 1021, 602 N.Y.S.2d at 996. Once back in New York, the respondent applied for an order of protection against the petitioner through the Family Court of Kings County. *Id.* That application was stayed, and the Hague proceeding resulted. *Id.*

⁷⁶ BLACK'S LAW DICTIONARY 1308-09 (6th ed. 1990). The terms "residence" and "domicile" are compared and distinguished as follows:

Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one's domicile.

Id. See 49 NY Jur. 2d § 2 at 7-8 (1985) ("Residence can be determined by physical fact alone, but domicil depends on intent, because 'residence' means simply living in a particular locality, but 'domicil' means living in that locality with intent to make it a fixed and permanent home.").

⁷⁷ See 25 Am. Jur. 2d *Domicil* § 41 (1996) ("A minor's domicil is the same as that of the minor's parents."). See also *Friedrich v. Friedrich*, 983 F.2d 1396, 1401 (6th Cir. 1993) (stating that "habitual residence" should not be confused with domicile which focuses on the parent, not the child); *Rosario v. INS*, 962 F.2d 220, 224 (2d Cir. 1992) ("A minor's domicile is the same as

keeps a domicile in one location but resides with the child on a regular basis in another location. Thus, under *Cohen*, a child may be returned to a jurisdiction where he or she has spent little or no time because the parent intended to make that jurisdiction their domicile. This undermines the purpose of the Convention, which is to avoid uprooting a child and subjecting him or her to custodial determinations in a jurisdiction where the child has no meaningful ties.⁷⁸

Furthermore, the *Cohen* approach contravened the intent of the drafters of the Convention, who specifically rejected the concept of "domicile" to avoid the application of a rigid and technical criteria to determine a child's habitual residence. The intent was for the concept of habitual residence to be flexible in light of the facts of a specific case, the various judicial systems involved, and the social and cultural differences of the signatories.⁷⁹

The courts began to move away from the concept of domicile and towards the concept of residence in the case of *In re Gabriella M.*⁸⁰ In *Gabriella M.*, the Family Court held that a child's customary residence prior to his or her removal or retention, rather than

that of its parents, since most children are presumed not legally capable of forming the requisite intent to establish their own domicile.").

⁷⁸ See *supra* notes 6 – 17 and accompanying text. Despite the difference between the concepts of "domicile" and "residence," some courts have held that parental intent is a factor in determining a child's habitual residence. See *In re Ponath*, 829 F. Supp. 363, 367 (D. Utah 1993) ("[T]he desires and actions of the parents cannot be ignored by the court in making [a] determination [where] the child was at the time of the removal or retention"); *Harsacky v. Harsacky*, 930 S.W.2d 410, 414 (Ky. Ct. App. 1996) ("[W]hen considering a parent's complaint that a child has been abducted and wrongfully removed to a jurisdiction, the Court must ask whether the parent intended or agreed that the jurisdiction would be home to the child, if only for an indefinite period.").

⁷⁹ Explanatory Report by E. Perez-Vera, Hague Conference on Private International Law, Acts and Documents of the 14th Session 53 (1982) (ed. Permanent Bureau of the Hague Convention on Private International Law) [hereinafter Perez-Vera Report]. See *Levesque v. Levesque*, 816 F. Supp. 662, 666 (D. Kan. 1993) (determining that the drafters' intent was "for the concept to remain fluid and fact based, without becoming rigid.").

⁸⁰ N.Y. L.J., Dec. 16, 1993, at 26 (Fam. Ct. Kings County).

United States citizenship or parental *intent*, was controlling in determining a child's habitual residence.⁸¹ The court returned a four year old child to Hungary where the child, a Hungarian and United States citizen, lived most of his life prior to his retention in the United States.⁸² The child's parents, both of whom had lived and worked in Budapest, had raised the child under joint custody until his retention by the respondent.⁸³ The child's two month visit with the respondent's parents in the United States prior to his retention was merely a vacation and did not change the child's residence.⁸⁴

New York has since abandoned the "domicile" approach in favor of defining habitual residence in terms of a "settled purpose."⁸⁵ This analysis, which had been developing in other federal and state jurisdictions,⁸⁶ appears to have been first applied in *In re David B. v. Helen O.*,⁸⁷ where the Family Court held that there must be a

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ See *In re David B. v. Helen O.*, *infra* note 87 and accompanying text.

⁸⁶ See *Feder v. Evans-Feder*, 63 F.3d 217,224 (3d Cir. 1975); *Rydder v. Rydder*, 49 F.3d 369, 373 (8th Cir. 1995); *Friedrich v. Friedrich*, 983 F.2d 1396, 1400-01 (6th Cir. 1993); *Slagenweit v. Slagenweit*, 841 F. Supp. 264, 268-69 (N.D. Iowa 1993); *Levesque v. Levesque*, 816 F. Supp. 662, 666 (D. Kansas 1993); *Falls v. Downie*, 871 F. Supp. 100, 102 (D. Mass. 1994); *Schroeder v. Vigil-Escalera Perez*, 664 N.E.2d 627, 632-33 (Ohio Com. Pl. 1995). Later cases include *Brooke v. Willis*, 907 F. Supp. 57, 61 (S.D.N.Y. 1995); *Walton v. Walton*, 925 F. Supp. 453, 456-57 (S.D. Miss. 1996). The "settled purpose" analysis was adopted from the British case *In re Bates*, [Feb. 23, 1989] No. CA 122/89 (High Ct. of Justice, Fam. Div'l Ct., Royal Ct. of Justice, United Kingdom, which held that "[a]ll that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled" (*quoting* *R v. Barnet London Borough Council ex parte Shah*, [1983] 2 A.C. 309. 314).

⁸⁷ *In re David B. v. Helen O.*, 625 N.Y.S.2d 436 (Fam. Ct. N.Y. County 1995).

suitable degree of continuity in the child's living arrangements in order for the court to consider the child "settled" in that country.⁸⁸

In *David B.*, the father, a British national, petitioned for the return of his children to England.⁸⁹ The mother, a British and Nigerian national, was living with the children in the New York City shelter system.⁹⁰ The court found that the United States was not the children's habitual residence because they were not settled here.⁹¹ They were found to be habitual residents of Nigeria, not England, because the majority of their time and education was spent in Nigeria, their possessions and relatives were in Nigeria, and the father had supported the mother and children's application for a Nigerian residency permit.⁹² These facts exhibited a continuity of living in Nigeria, whereas the moves to England and the United States were considered brief and did not establish fixed residences.⁹³

In *Brennan v. Cibault*,⁹⁴ the Appellate Division, Fourth Department, defined settled purpose as "evidenced by the child's circumstances in that place and the shared intentions of the parents regarding their child's presence there . . . [t]he focus is on the child rather than the parents, and on past experience rather than future intentions."⁹⁵ In *Brennan*, France was determined to be the child's habitual residence.⁹⁶ The child, who was over two years old at the time of the proceedings, was born and raised in France for the first sixteen months of her life.⁹⁷ Her parents were married in France and had established a home and professions there. The child came

⁸⁸ *Id.* at 440.

⁸⁹ *Id.* at 437.

⁹⁰ *Id.* at 440.

⁹¹ *Id.*

⁹² *Id.* at 441.

⁹³ *Id.*

⁹⁴ 227 A.D.2d 965, 643 N.Y.S.2d 780 (4th Dep't 1996).

⁹⁵ *Id.* at 966, 643 N.Y.S.2d at 782.

⁹⁶ *Id.*

⁹⁷ *Id.*

to the United States only for a six-week visit with her grandmother. The court found that "[these] facts reflect a settled purpose on the part of the parties to establish [the child's] life in France." ⁹⁸

In *Cassie M.D. v. Othmar D.*,⁹⁹ the past experiences and overt acts of the parents demonstrated a purpose to settle in the United States, not Austria. In this matter, the petitioner, a United States citizen, had come to the United States from Austria.¹⁰⁰ Her husband, the respondent, arrived later with the child.¹⁰¹ The parties had subletted their apartment in Austria, sold their car and furniture in Austria, settled outstanding debts, and applied for a visa for the respondent, who secured permanent employment in Pennsylvania.¹⁰² Furthermore, the petitioner's witnesses established that the respondent was making arrangements to permanently reside in the United States.¹⁰³ Therefore, the Family Court declined to order the child returned to Austria with the respondent because the conduct, overtly stated intentions, and agreements of the parties during the period preceding the alleged retention indicated that the United States was the child's habitual residence.¹⁰⁴

Finally, in *Brooke v. Willis*,¹⁰⁵ the federal district court held that the period of time a child spends in a particular location does not determine the existence of a settled purpose.¹⁰⁶ In *Brooke*, the

⁹⁸ *Id.*

⁹⁹ N.Y. L.J., Mar. 29, 1996, at 32 (Fam. Ct. New York County).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ 907 F. Supp. 57 (S.D.N.Y. 1995).

¹⁰⁶ *Id.* at 61. In *Brooke*, petitioner was a British citizen living in England and respondent was a naturalized citizen of the United States. *Id.* at 58. A child custody order provided for joint legal and physical custody of child where the child would spend fifty percent of her time with each parent. *Id.* According to the order, the petitioner delivered the child from England to the respondent then living in the United States. *Id.* at 59. When the respondent

court defined settled purpose as "determined more by a state of being than by any specific period of time; technically, habitual residence can be established after only one day as long as there is some evidence the child has become 'settled' into the location in question."¹⁰⁷ In this case, England was declared the child's habitual residence at the time she was abducted, because although she had spent only one summer there, "she was well accustomed to her surroundings."¹⁰⁸ The child enjoyed living in England with the petitioner's parents, visiting with her relatives, and engaging in activities that indicated she was settled there.¹⁰⁹

As these cases demonstrate, the New York courts will determine a child's habitual residence by where the child physically resides on a continuous basis and whether this location is the center of the child's daily existence immediately prior to the abduction or retention.¹¹⁰ The courts will consider the child's education, family relations, activities, health, and family employment to determine whether a child's presence in a particular country can be characterized as habitual or "settled."¹¹¹ Only the actual recent history of the child's living pattern and the parent's overt actions prior to the child's abduction or retention, not the parent's future intentions, will be considered.¹¹² Therefore, a return petition should allege facts that sufficiently establish a continuity and history of living in the signatory to which the petitioner seeks the child's return. If the facts do not demonstrate a "settled purpose," the

failed to return the child at the end of her custody period, the petitioner filed an action under the Convention. *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* In *Brooke*, the respondent failed to appear, thus the court's determination was based solely upon the petitioner's presentation of the facts. *Id.* at 62.

¹¹⁰ See *supra* notes 86-109 and accompanying text.

¹¹¹ *Id.*

¹¹² *Id.*

courts have no basis for ordering the child's return under the Convention.¹¹³

C. The Exercise of Judicial Discretion in Adjudicating a Return Petition

The Hague Convention imposes upon the courts of an abducted-to signatory several restrictions on the exercise of their judicial discretion. The first and most significant restriction is that the courts may not consider the merits of any custody issue underlying an abduction.¹¹⁴ The second restriction is that they may not issue a custody determination once they have received notice of the child's retention or removal.¹¹⁵ A third restriction is that the courts may not refuse to order the return of an abducted child based solely upon a custody order from their own courts or the courts of another country.¹¹⁶ Thus, a respondent cannot exclude a child from the Convention's protection simply because that respondent obtained a custody order in the abducted-to signatory.

Other than these restrictions, the courts may order the return of a child at anytime under laws other than the Convention, such as other treaties, agreements, procedures, or the principles of international comity.¹¹⁷ They may also consider the reasons underlying an existing custody decree when adjudicating a

¹¹³ *Id.*

¹¹⁴ Hague Convention, *supra* note 1, ch. III, art. 16, 19, T.I.A.S. No. 11,670, at 9, 22514 U.N.T.S. at 101; ICARA, 42 U.S.C.A. § 11601(b)(4). *See Tyska v. Tyska*, 503 N.W.2d 726, 728 (Mich. Ct. App. 1993) (vacating the trial court's custody determination because it was rendered after the trial court determined that the child was wrongfully retained in the United States from France under Article 3 of the Convention).

¹¹⁵ Hague Convention, *supra* note 1, ch. III, art. 16, T.I.A.S. No. 11,670, at 9, 22514 U.N.T.S. at 101.

¹¹⁶ *Id.* ch. III, art. 17, T.I.A.S. No. at 9, 22514 U.N.T.S. at 101.

¹¹⁷ *Id.* ch. III, art. 18, T.I.A.S. No. 11,670, at 9, 22514 U.N.T.S. at 101; ICARA, 42 U.S.C.A. § 11603(h).

petition.¹¹⁸ Furthermore, and most importantly, the courts may deny a child's return, at its discretion, pursuant to several exceptions set forth by the Convention.¹¹⁹

Under these exceptions, a return petition may be denied if it was not commenced within the one year statute of limitations and if it is shown, by a preponderance of the evidence, that the child has settled into his or her new environment.¹²⁰ A petition may also be denied where it can be shown, by a preponderance of the evidence, that the person, institution or other body having care of the child was either not exercising custody rights at the time of removal or retention, or had acquiesced or consented to the removal or retention.¹²¹ Furthermore, it may be denied where the facts demonstrate, once again by a preponderance of the evidence, that the child has attained an age and degree of maturity and objects to being returned.¹²² Finally, a petition may be denied where it is shown, by clear and convincing evidence, that there is a grave risk

¹¹⁸ Hague Convention, *supra* note 1, ch. III, art. 17, T.I.A.S. No. 11,670, at 9, 22514 U.N.T.S. at 101.

¹¹⁹ ICARA, 42 U.S.C.A. § 11601(a)(4).

¹²⁰ Hague Convention, *supra* note 1, ch. III, art. 12, T.I.A.S. No. 11,670, at 7-8, 22514 U.N.T.S. at 100; ICARA, 42 U.S.C.A. § 11603(e)(2)(B); *see In re* Petition for Coffield, 644 N.E.2d 662, 666 (Ohio App. 1994) (determining that five year old was not considered settled in his new environment of ten months because he had a limited group of friends and there was no evidence that he was enrolled in school or involved in other activities); *In re* David S. v. Zamira S., 151 Misc.2d 630, 574 N.Y.S.2d 429, 433 (Fam. Ct. Kings County 1991) (finding that children aged three, and one and one half, who were not shown to have attended school, religious services or instruction, or to have formed meaningful relationships, were not "settled" in a new environment).

¹²¹ Hague Convention, *supra* note 1, ch. III, art. 13(a), T.I.A.S. No. 11,670, at 8, 22514 U.N.T.S. at 101; ICARA, 42 U.S.C.A. § 11603(e)(2)(B); *see* Friedrich v. Friedrich, 78 F.3d 1060, 1070 (6th Cir. 1996) ("[A]cquiescence under the Convention requires either: an act or statement with the requisite formality, such as testimony in a judicial proceeding; a convincing written renunciation of rights; or a consistent attitude of acquiescence over a significant period of time.").

¹²² Hague Convention, *supra* note 1, ch. III, art. 13, T.I.A.S. No. 11,670, at 8, 22514 U.N.T.S. at 101; ICARA, 42 U.S.C.A. § 11603(e)(2)(B).

that returning the child would expose him or her to psychological or physical harm or an otherwise intolerable situation,¹²³ or that returning the child would violate the fundamental human rights and "fundamental freedoms" of the abducted-to signatory.¹²⁴

Although Articles 16 and 19 of the Hague Convention state that decisions rendered under the Convention are not to be made upon or construed by others as a decision on the merits of a custody issue, many of the exceptions to returning a child to his or her habitual residence bestows upon the judiciary such broad discretion that what is meant to be a summary proceeding can become an evidentiary hearing on the merits of the underlying custody issues.¹²⁵ Terms such as "intolerable situation," "grave risk," "settled in a new environment," and the threshold level of "physical or psychological harm," are not defined by the Convention. Ascertaining their meaning necessitates an examination of the child's familial and social environment, such as the parental qualities of the child's parents or caretakers, and the nature and quality of the parents' and child's lifestyles. Notwithstanding that the Convention permits consideration of the child's social background as provided by the Central Authorities or other competent authorities,¹²⁶ it may be difficult to distinguish between evidence pertaining to the child's immediate situation if returned and evidence pertaining to parental fitness. The latter inquiry relates to the child's best interest and is usually reserved for a custody proceeding on the merits.

The Convention also does not offer any guidance in evaluating a child's preference to remain in the abducted-to signatory in light of the child's age and maturity. This determination involves subjective judgment, even where courts use "objective"

¹²³ Hague Convention, *supra* note 1, ch. III, art. 13(b), T.I.A.S. No. 11,670, at 8, 22514 U.N.T.S. at 101; ICARA, 42 U.S.C.A. § 11603(e)(2)(A).

¹²⁴ Hague Convention, *supra* note 1, ch. III, art. 20, T.I.A.S. No. 11,670, at 9, 22514 U.N.T.S. at 101; ICARA, 42 U.S.C.A. § 11603(e)(2)(A).

¹²⁵ Hague Convention, *supra* note 1, ch. III, art. 16-19, T.I.A.S. No. 11,670, at 9, 22514 U.N.T.S. at 101.

¹²⁶ Hague Convention, *supra* note 1, ch. III, art. 13, T.I.A.S. No. 11,670, at 8, 22514 U.N.T.S. at 101.

psychological reports. These reports usually examine familial relationships, life experiences, and complex psychological issues, which, once again, bear upon the merits of a custodial arrangement. A child's wishes are best left to a custody proceeding where a child can be represented, removed from the possibility of parental influence, and have his or her wishes examined in the context of his or her overall best interest.¹²⁷

Furthermore, the exceptions present a risk of imposing value judgments upon the political, social, cultural, and legal environment of the child's habitual residence. Cultural distinctions disguised as familial situations may be introduced into the proceedings. Determining what constitutes a "grave risk" or whether a situation meets the fundamental human rights exception entails consideration of the impact of a signatory's cultural, legal, and political practices on the child. Occasions may arise where returning a child conflicts with our country's fundamental beliefs. For example, should our courts return a child to a country where due process will not be applied to the child and his or her parents as interpreted by our federal constitution? The risk of using the exceptions as a pretext for cultural bias is further exacerbated by the fact that the courts have the choice of applying its own law or the law of the child's habitual residence.¹²⁸ The law that is chosen may depend upon the outcome the court wants to achieve, which may reflect a social or cultural bias.

There is no significant body of case law in New York applying the various exceptions to returning a child or discussing the exercise of judicial discretion under the Convention. In one of two cases concerning a child's preference to remain in the United States, *Sheikh v. Cahill*,¹²⁹ the court found that, based upon an in camera

¹²⁷ For a full discussion on the child objection exception, see Rania Nanee, Note, *The Views of a Child: Emerging Interpretation and Significance of the Child's Objection Defense Under the Hague Child Abduction Convention*, 22 BROOK. J. INT'L L. 437 (1996).

¹²⁸ Hague Convention, *supra* note 1, ch. III, art. 14, T.I.A.S. No. 11,670, at 8, 22514 U.N.T.S. at 101.

¹²⁹ 145 Misc.2d 171, 177, 546 N.Y.S.2d 517, 521 (Sup. Ct. Kings County 1989).

interview, a nine year old boy's preference to remain in the United States was the product of his father's influence during his wrongful retention.¹³⁰ The court did not discuss the application of the exception or articulate the standard it applied in evaluating the child's preference. In the other case, *Daniel H. v. Catherine Ann O.H.*,¹³¹ the court found that, based upon an in camera interview and the testimony of a licensed psychologist, the parties' ten year old son was sufficiently mature and capable of forming a preference to remain in the United States.¹³² The court found that his seven year old brother, however, lacked the maturity to make the same determination.¹³³ Since the court was convinced that the ten year old's love for his younger brother was stronger than his desire to remain in the United States, and since there were no overwhelming circumstances to justify the brothers' separation, they were both returned to Cyprus.¹³⁴ While the court set forth its factual reasons for not applying the preference exception, it did not discuss its approach to evaluating the child's preference or the type of psychological evidence allowed in the psychologist's testimony.¹³⁵

The New York courts have also failed to discuss the scope of judicial discretion when applying the grave risk/intolerable situation. In *Daniel H.*, the respondent's claim that political turmoil in Cyprus would pose a grave risk of physical or psychological harm to her children was refuted by testimony of the Consul General of Cyprus on the country's political stability.¹³⁶ The court noted that Monroe County, the New York community where the respondent sought to raise her children was, according to local newspapers, undergoing an epidemic of youth violence.¹³⁷ Thus,

¹³⁰ *Id.* at 177, 546 N.Y.S.2d at 522.

¹³¹ N.Y. L.J., Oct. 17 1996, at 32 (Fam. Ct. Monroe County).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ N.Y. L.J., Oct. 17 1996, at 32 (Fam. Ct. Monroe County).

¹³⁷ *Id.*

the children's safety could not be guaranteed in the United States or Cyprus.

In the matter of *In re Gabriella M.*,¹³⁸ the court dismissed the respondent's claim that Hungary posed a grave risk to the retained child because there was no evidence offered in support of the respondent's contentions.¹³⁹ Finally, in *Sheikh*, the court found no evidence in the court papers or in an in camera interview with the child supporting the respondent's contention that returning the child to the United Kingdom would pose a grave risk or intolerable situation.¹⁴⁰ In these three cases, the courts merely decided on the facts without defining the exception or identifying the factors they considered in determining whether the exception applied.

The court in *in re David S. v. Zamira S.*,¹⁴¹ came closest to defining an exception. In *David S.*, the court considered the "settled in a new environment" exception and determined that a three year old son and a one and half year old daughter were not settled in Brooklyn because there was no evidence that the children established "meaningful ties" to the community.¹⁴² They were too young to participate in school and religious and social activities, and had not yet formed meaningful friendships.¹⁴³ The court ordered them returned to Ontario, Canada where the children's relatives lived, friends of both parents resided, and the respondent maintained an apartment. The respondent's search for a new husband in Brooklyn did not satisfy the exception.¹⁴⁴

Despite the lack of authority in New York on the scope of judicial discretion in applying the Convention's exceptions, there is a general consensus in the United States that the exceptions should

¹³⁸ N.Y. L.J., Dec. 16, 1993, at 26 (Fam. Ct. Kings County).

¹³⁹ *Id.*

¹⁴⁰ *Sheikh v. Cahill*, 145 Misc.2d 171, 177, 546 N.Y.S.2d 517, 521 (Sup. Ct. Kings County 1989).

¹⁴¹ *In re David S. v. Zamira S.*, 151 Misc.2d 630, 574 N.Y.S.2d 429 (Fam. Ct. Kings County 1991).

¹⁴² *Id.* at 636, 574 N.Y.S.2d at 433.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 636-37, 574 N.Y.S.2d at 433-34.

be narrowly construed.¹⁴⁵ Nonetheless, what constitutes a "narrow" construction has not been comprehensively defined, leaving the door open for the judiciary to subjectively assess the personal and parental qualities of the parties and evaluate the political, cultural, and social elements of the signatories involved. The application of the grave risk/intolerable situation exception in two cases illustrates this dilemma. On the one hand, the Appeals Division of the New Jersey Superior Court in *Tahan v. Duquette*¹⁴⁶ affirmed a lower court's ruling that the ultimate personal and parental qualities of the parties should not be considered in determining whether a threat to a child's physical and psychological well-being exists if the child is returned.¹⁴⁷ Consideration should be limited only to whether the child's surroundings and the "basic personal qualities of those located there" would pose a grave risk or create an intolerable situation.¹⁴⁸ The Appeals Division stated that

¹⁴⁵ See ICARA, 42 U.S.C.A. § 11601(a)(4) (refers to the exceptions as "narrow"); *Wanniger v. Wanniger*, 850 F. Supp. 78, 81 (D. Mass. 1994) (stating that the exceptions are to be constructed "very narrowly . . . [e]ven if one of the exceptions is found applicable, the court is not required to refuse a return order"); *Levesque v. Levesque*, 816 F. Supp. 662, 667 (D. Kan. 1993) ("All of the exceptions which allow courts to deny the return of children under the Convention are intended to be construed and applied very narrowly to effectuate the objectives of the convention.").

¹⁴⁶ 613 A.2d 486 (N.J. Super. Ct. App. Div. 1992).

¹⁴⁷ *Id.* at 489-90.

¹⁴⁸ *Id.* at 489. The *Tahan* court conducted an "Article 13b inquiry" which focuses exclusively upon jurisdictional issues and not individuals. The court stated that:

[An] Article 13b inquiry was not intended to deal with issues or factual questions which are appropriate for consideration in a plenary custody proceeding. Psychological profiles, detailed evaluations of parental fitness, evidence concerning lifestyle and the nature and quality of relationships all bear upon the ultimate issue. The Convention reserves these considerations to the appropriate tribunal in the place of the habitual residence . . . No court on a petition for return should intrude upon a foreign tribunal's subject matter jurisdiction by addressing such issues.

Id. at 489. See *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, 378 (8th Cir. 1995) (remanding the case to lower court for a determination on the

while Article 13(b) requires the courts to recognize more than the civil stability of a child's habitual residence, the court should evaluate the child's surroundings and social background without examining complex, psychological issues or overall parental fitness.¹⁴⁹

The Connecticut Superior Court in *Renovales v. Roosa*,¹⁵⁰ on the other hand, admitted evidence on the parties' psychological profiles, parenting styles, nature of the children's relationship with the parties, and the familial structure to evaluate the anticipated effects of returning the children to Spain.¹⁵¹ This type of evidence related to the merits of the custodial arrangement. The court found that while both parents "love[d] the children deeply," the petitioner's strict method of raising the children, which was attributed, in part, to cultural differences, did not pose a grave risk or intolerable situation for the children and ordered them to be

application of the Article 13b with instructions to not consider evidence that bears upon the custody or best interest of the child).

¹⁴⁹ *Tahan*, 613 A.2d at 489. The *Tahan* court stated that

[I]t is clear that Article 13b requires more than a cursory evaluation of the home jurisdiction's civil stability . . . [i]f that were all that were required, the drafters of the Convention could have found a clear more direct way of saying so . . . To hold . . . that the proper scope of inquiry precludes any focus on the people involved is, in our view, too narrow and mechanical. Without engaging in an exploration of psychological make-ups, ultimate determinations of parenting qualities, or the impact of life experiences, a court in the petitioned jurisdiction, in order to determine whether a realistic basis exists for apprehensions concerning the child's physical safety or mental well-being, must be empowered to evaluate the surroundings to which the child is to be sent and the basic personal qualities of those located there.

Id. See also *Currier v. Currier*, 845 F.Supp 916, 923 (D.N.H. 1994) (The court, noting that the focus of the Article 13(b) exception is limited to the grave risk, if any, that situation seriously presents for the children," did not find allegations of the respondent's depression or estranged relationship with her parents relevant to whether the child should be returned absent evidence that these conditions put the child in danger).

¹⁵⁰ 1991 WL 204483, at *5 (Conn. Super. Ct. Sept. 27, 1991).

¹⁵¹ *Id.* at *4-5.

returned to Spain.¹⁵² The court remarked that the respondent, who was seriously ill, had to face the consequences of choosing to love, marry, and bear children in Spain and could not "rip their children out of the country of their residence."¹⁵³ The court passed further judgment on the "wonderful and unique cultures" of Spain and the United States, commenting that "neither exclusively offer[ed] more or greater guarantees of success in child upbringing."¹⁵⁴ Instead of considering whether the children would face immediate danger or an intolerable situation if returned to Spain, the court, in actuality, conducted an evidentiary inquiry into the merits of the signatories and the parties' parental fitness.

To avoid consideration of the child's long-term best interests and the social mores of the signatories involved, a "narrow" construction of the exceptions should include limiting psychological evidence to the immediate psychological and emotional impact of returning a child to his or her habitual residence. Psychological evidence should also be limited to assessing the child's level of maturity to express a preference (such as choosing to live in the abducted-to signatory) and whether this preference is valid in light of the child's demonstrated ties to his or her "new" surroundings. A narrow construction should also be limited to considering only the basic qualities of the parties, whether the child would be subject to abuse or neglect if returned, and the signatory's current state of affairs such as war, disease, famine, or natural disaster. When evaluating whether the child has established meaningful ties to the abducted-to signatory, the court should focus on what the child's relationships and activities mean to the child in light of the child's age and maturity, not whether the court believes the relationships would be good for the child.

The court should also not focus on which parent is "right or wrong," and should refrain from debating the relative cultural, social, and legal merits of the signatories involved. Furthermore, the court should presume that the courts of foreign signatories are

¹⁵² *Id.* at *5.

¹⁵³ *Id.* at *6.

¹⁵⁴ *Id.*

just as concerned as the courts of the United States with the safety and well-being of a child who is the subject of a custody dispute, and have confidence that the custody dispute will be appropriately resolved.¹⁵⁵ Finally, the court should be mindful that even if an exception applies, it is still within the court's discretion to return the child to his or her habitual residence if the return is in accordance with the intent of the Convention.¹⁵⁶ Overall, the goal in exercising judicial discretion should be to prevent a decision that would have an uncertain effect on the child in the event the parties' circumstances change, to reduce the trauma of uprooting the child, and to reserve the underlying custody issues for the courts of the child's habitual residence.¹⁵⁷

IV. SECURING ACCESS TO A CHILD: VISITATION PETITIONS

In addition to effectuating the return of an internationally abducted child to a custodial parent or person, the Hague Convention attempts to protect the visitation rights of noncustodial parents.¹⁵⁸ The visitation provision of the Hague Convention, Article 21, is more discretionary than mandatory, requiring only that the Central Authorities "promote the peaceful enjoyment of access rights and the fulfillment of any conditions to which the exercise of those rights may be subject" by taking steps to remove

¹⁵⁵ See Perez-Vera Report, *supra* note 79, no.34, at 426 (discussing that the signatories, despite their differences, should presume they belong to the same legal community); *Friedrich*, 78 F.3d at 1068 ("[W]e acknowledge that courts in the abducted-from country are as ready and able as we are to protect children. If return to a country, or to the custody of a parent in that country, is dangerous, we can expect that country's courts to respond accordingly.").

¹⁵⁶ Legal Analysis, *supra* note 7 at 10509; *Friedrich v. Friedrich*, 78 F.3d 1060, 1067 (6th Cir. 1996); *Levesque v. Levesque*, 816 F. Supp. 662, 667 (D. Kan. 1993).

¹⁵⁷ *Id.* at 1068.

¹⁵⁸ Hague Convention, *supra* note 1, ch. I, art. 1(b), T.I.A.S. No. 11,670, at 4, 22514 U.N.T.S. at 98, ch. I, art. 5b, T.I.A.S. No. 11,670, at 5, 22514 U.N.T.S. at 99, ch. IV, art. 21, T.I.A.S. No. 11,670, at 10, 22514 U.N.T.S. at 102; ICARA, 42 U.S.C.A. §§ 11601(a)(4), 11602(7).

"all obstacles to the exercise of such rights."¹⁵⁹ There are no provisions mandating the "return" of a child to the noncustodial parent's signatory for the purposes of visitation. There are also no guidelines on how the Central Authorities are to go about securing the exercise of visitation rights, except that they may initiate or assist in the commencement of an Article 21 proceeding to secure the exercise of visitation rights under the Convention.¹⁶⁰ Therefore, it is ultimately at the discretion of the courts as to how visitation-rights will be exercised by a noncustodial parent.

An Article 21 petition should be filed with the administrative or judicial authorities of the child's habitual residence in the same manner as a return petition, except the grounds would differ and the relief requested would be access to the child, rather than the child's return.¹⁶¹ A petitioner must establish by a preponderance of the evidence that he or she has a right of access.¹⁶² In New York, a noncustodial parent may secure visitation rights through either a court decree or an agreement with the custodial parent having legal effect.¹⁶³ Thus, a noncustodial parent seeking visitation with his or her child abroad pursuant to a New York decree may commence an Article 21 proceeding in the child's habitual residence. Similarly, a noncustodial parent with a visitation decree from abroad who seeks access to his or her child located in New York may commence an Article 21 proceeding in the New York courts to determine how visitation rights are to be exercised.¹⁶⁴

¹⁵⁹ Hague Convention, *supra* note 1, ch. IV, art. 21, T.I.A.S. No. 11,670, at 10, 22514 U.N.T.S. at 102.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² ICARA, 42 U.S.C.A. § 11603(e)(1)(B).

¹⁶³ DRL § 240(1); *see* DRL § 240(3) ("An agreement by the parties made before or during the marriage, shall be valid and enforceable . . . Such an agreement may include . . . provision for the custody, care, . . . of any child of the parties."); DRL § 236(B)(3)(2) ("The court may make an order of protection . . . to permit a parent to visit the child at stated periods.").

¹⁶⁴ Recognition of a foreign visitation decree in New York may also be accomplished through the UCCJA pursuant to DRL § 75-w which extends the Domestic Relations Law to the international realm. DRL § 75-w. However,

Article 21 may not be used to compel the transport of a child to the noncustodial parent's signatory for visitation purposes. This interpretation of the scope of Article 21 was first articulated by the Massachusetts Supreme Court in *Viragh v. Foldes*,¹⁶⁵ the first reported case in the United States to address a visitation petition. In *Viragh*, a noncustodial parent residing in Hungary sought to enforce a Hungarian visitation decree in Massachusetts by having his child "returned" to Hungary for visitation.¹⁶⁶ The court, in denying his request, held that a noncustodial parent who is denied access to his or her child by the custodial parent may not use an Article 21 proceeding to have the child "returned" within the meaning of Article 3 for the purposes of visitation,¹⁶⁷ because "the Convention does not mandate any specific remedy when a noncustodial parent has established interference with rights of access."¹⁶⁸ The court did suggest, however, that a child may be returned at the court's discretion under Article 18 of the Convention, which states that the Convention does not prohibit the courts from ordering the child returned at any time under provisions other than the Convention.¹⁶⁹

Article 21 may also not be used in a proceeding in the noncustodial's signatory to evade the administrative or judicial authority of the child's habitual residence to determine visitation issues.¹⁷⁰ Furthermore, it may not be used by a noncustodial parent during a child's visit to obtain, from the noncustodial's signatory, modification of the visitation conditions established prior

since the international travel of the child may be involved, it may be wise to also pursue visitation rights through the Convention to ensure the involvement of the Central Authorities.

¹⁶⁵ 612 N.E.2d 241, 247 (Mass. 1993).

¹⁶⁶ *Id.* at 243-46.

¹⁶⁷ *Id.* at 247; *see also* *Ivaldi v. Ivaldi*, 672 A.2d 1226, 1232 (N.J. Super. Ct. App. Div. 1996) ("[T]he Convention does not mandate the return of children to the noncustodial parent for the purpose of visitation.") (*citing* *Viragh v. Foldes*, 612 N.E.2d 241, 246 (Mass. 1993)).

¹⁶⁸ *Viragh*, 612 N.E.2d at 247.

¹⁶⁹ *Id.* at 247 n. 10.

¹⁷⁰ Legal Analysis, *supra* note 7, at 10514.

to the child's visit.¹⁷¹ Modifications are to be made by the administrative or judicial authorities of the child's habitual residence.¹⁷²

A custodial parent may invoke Article 21 to secure the Central Authority's assistance in ensuring the child's return at the expiration of the visitation period.¹⁷³ The custodial parent can request from the courts, with the Central Authority's help, that conditions be imposed upon the noncustodial parent such as a performance bond, temporary suspension of the noncustodial parent's passport,¹⁷⁴ or supervised visitation. The custodial parent may also file a return petition alleging wrongful retention under Article 3 if the child is not returned when the visitation period expires.¹⁷⁵

The Convention does not address visitation by persons other than the noncustodial parent, such as stepparents, grandparents, siblings, and other relatives, although New York permits grandparent visitation.¹⁷⁶ It also does not offer assistance to those financially

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ See Hague Convention, *supra* note 1, ch. IV, art. 21, T.I.A.S. No. 11,670, at 10, 22514 U.N.T.S. at 102. The custodial parent may want to obtain an order directing the respondent to seek a reciprocal visitation order from the courts of the respondent's signatory recognizing the jurisdiction of the child's habitual residence and agreeing to order the child returned in the event of a retention.

¹⁷⁴ See *Klien v. Klien*, 141 Misc.2d 174, 181, 33 N.Y.S.2d 211, 215 (Sup. Ct. Kings County 1988) (ordering respondent to surrender children's passports to petitioner).

¹⁷⁵ See *In re Brennan v. Cibault*, 227 A.D.2d 965, 966-67, 643 N.Y.S.2d 780, 782 (4th Dep't 1996) (finding that an American father wrongfully retained child who was visiting from France); *In re Gabriella M.*, N.Y. L.J., Dec. 16, 1993, at 26 (Fam. Ct. Kings County) (finding that a child in United States on vacation from Hungary wrongfully retained by father); *Sheikh v. Cahill*, 145 Misc.2d 171, 174, 546 N.Y.S.2d 520, 522 (Sup. Ct. Kings County 1989) (ordering the child returned to the United Kingdom under the mother's care after the father wrongfully retained the child in the United States following a one month visitation as ordered by English courts).

¹⁷⁶ See DRL § 240(1).

unable to exercise their rights of access. In *Viragh*, the noncustodial parent from Hungary claimed on appeal that he could not afford to visit his child, who resided in Massachusetts.¹⁷⁷ Although the case was remanded to the trial court for a hearing on the financial issues, there was no indication as to what the courts should do when confronted with impoverished parents. Since the cost of living may differ among signatories, finances may pose a barrier to exercising visitation rights abroad.

The Convention does permit the award of necessary expenses to the noncustodial parent by the custodial parent.¹⁷⁸ However, *Viragh* held that attorney fees are not to be awarded in Article 21 proceedings, only in return proceedings commenced under Article 3.¹⁷⁹ This ruling will be further explored in the section addressing costs associated with Convention proceedings.

To date, *Viragh* remains the only case in the United States to address a visitation petition. The only other case to touch upon access rights, *Ivaldi v. Ivaldi*,¹⁸⁰ merely affirmed that the Convention does not mandate the return of a child where the petitioner only had a right of access.¹⁸¹ There are currently no reported cases in New York concerning an Article 21 proceeding.

V. NOTICE AND THE OPPORTUNITY TO BE HEARD

The Hague Convention is silent on providing notice and an opportunity to be heard to the respondent. Thus, it is up to the individual signatories to determine how service upon a respondent is to be made and whether any type of hearing will be afforded. In the United States, ICARA mandates that notice "shall be given in accordance with the applicable law governing notice in interstate

¹⁷⁷ *Viragh v. Foldes*, 612 N.E.2d 241, 249 (Mass. 1993).

¹⁷⁸ *Id.* See also Hague Convention, *supra* note 1, ch. V, art. 26, T.I.A.S. No. 11,670, at 11, 22514 U.N.T.S. at 102.

¹⁷⁹ *Viragh*, 612 N.E.2d at 250.

¹⁸⁰ 672 A.2d 1226 (N.J. Super. Ct. App. Div. 1996).

¹⁸¹ *Id.* at 1232. The primary issue in *Ivaldi* was whether the court could entertain a return petition involving a nonsignatory. *Id.* at 1230-31.

child custody proceedings."¹⁸² It also mandates that a child shall not be returned to his or her habitual residence unless the applicable requirements of state law are satisfied.¹⁸³

The applicable law in New York governing notice in interstate child custody proceedings is the UCCJA.¹⁸⁴ The UCCJA requires reasonable notice and an opportunity to be heard afforded to parents in New York State whose parental rights have not been previously terminated, and to anyone else in New York State who has physical custody of the child.¹⁸⁵ It also requires notice to persons located outside New York State to be reasonably calculated to give notice by either personal service, return receipt, or in such a manner as directed by the courts.¹⁸⁶ Where the person to be served is outside the United States, the UCCJA, which is an interstate statute, does not apply.¹⁸⁷ Nor would ICARA, which does not address foreign service and only refers to interstate statutes regarding domestic custody disputes.¹⁸⁸ Foreign service upon a person outside the

¹⁸² ICARA, 42 U.S.C.A. § 11603(c).

¹⁸³ *Id.* at § 11604(b).

¹⁸⁴ DRL § 75-b.

¹⁸⁵ DRL § 75-e; *see Brooke v. Willis*, 907 F. Supp. 57, 60 (S.D.N.Y. 1995) (determining that reasonable notice was given where Hague petitioner attempted service upon respondent several times and gave respondent court details over the phone); *Green v. Green*, N.Y. L.J. July 6, 1993, at 33 (Sup. Ct. Kings County) (determining that petitioner appeared for the purposes of the Domestic Relations Law and the Hague Convention by commencing the original custody proceeding and having her attorney accept service of cross motion of a Hague return petition).

¹⁸⁶ DRL § 75-f(1)(a)-(c); *see Leslie L.F. v. Constance F.*, 441 N.Y.S.2d 911, 917 (Fam. Ct. New York County 1981) (finding that petitioner must inform court that person cannot be served within state so that court can direct manner of service).

¹⁸⁷ *See Rissew v. Yamaha Motor Co., Ltd.*, 129 A.D.2d 94, 98, 515 N.Y.S.2d 352, 354 (4th Dep't 1987) ("The Hague Convention has the status of a self-executing treaty and constitutes the supreme law of the land under Article VI of the United States Constitution . . . [t]hus [the Service Abroad Treaty] takes precedence over state law.").

¹⁸⁸ *See ICARA*, 42 U.S.C.A. § 11603(c) (referring only to following the law that governs notice in interstate custody proceedings).

United States is governed by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters [hereinafter "Service Abroad Treaty"] where there is no agent of that person in the United States and if the country in question is a signatory to this treaty.¹⁸⁹ Under the Service Abroad Treaty, the summons and/or complaint are to be forwarded to the Central Authority located in the signatory of the person to be served and that Authority will effectuate service according to the signatory's civil procedure laws.¹⁹⁰

The issue of service upon a person outside of the United States in a Hague child abduction proceeding would most likely arise where an Article 15 determination has been requested from our courts by either the courts of an abducted-to signatory or the petitioner acting upon his or her own initiative. In that situation, notice that an Article 15 proceeding has been commenced in New York would have to be served upon a respondent located outside the United States in the abducted-to signatory. Since, however, service pursuant to the Service Abroad Treaty may prolong the determination of a return petition, the petitioner should ask the signatory where the respondent is located to expedite matters by recognizing service upon the respondent, provided that the

¹⁸⁹ Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 20 U.S.T. 361, (1969), *reprinted in* Fed. R. Civ. 4 [hereinafter the Service Abroad Treaty]; *see* Volkswagenwerk v Schlunk, 486 U.S. 694 (1988) (noting that if service can only be made in Europe, the Hague Convention must be fully complied with). Many cases in New York have affirmed that service upon a person outside the United States must be effectuated pursuant to the Service Abroad Treaty. *See* Wood v. Wood, 213 A.D.2d 713, 647 N.Y.S.2d 830 (2d Dep't 1996); Vasquez v. Sund Emba AB, 152 A.D.2d 389, 392-93, 548 N.Y.S.2d 728, 729-30 (2d Dep't 1989); Rissew v. Yamaha Motor Co., 129 Misc.2d 94, 98, 515 N.Y.S.2d 352, 354 (4th Dep't 1987); Low v. Bayerische Motoren Werke, 88 A.D.2d 504, 505, 449 N.Y.S.2d 733, 735 (1st Dep't 1982); Zwerling v. Zwerling, 167 Misc.2d 782, 785, 636 N.Y.S.2d 595, 598 (Sup. Ct. Queens County 1995).

¹⁹⁰ Service Abroad Treaty, *see supra* note 189, ch. I, art. 5.

signatory did not object to the method of service used when it ratified the treaty.¹⁹¹

As for return petitions adjudicated in New York, once notice is provided to the respondent to appear with the child in the United States via writ of habeas corpus,¹⁹² a hearing on the return application is to be held.¹⁹³ The child's name should be entered in all applicable state and federal registries as a missing person.¹⁹⁴ If

¹⁹¹ See Service Abroad Treaty, *supra* note 189, art. 10(a) (permitting the forwarding of judicial documents directly to the person abroad provided the country of designation did not object to this method of service when it ratified the treaty); N.Y. CIV. PRAC. L. & R. 313 (McKinney 1990) (Practice Commentary C313:2 at 428) ("If the 'Central Authority' is not used, and service is made under the CPLR, the service will be valid only if the signatory nation recognizes the service"); See also *Wood*, 213 A.D.2d at 713-14, 647 N.Y.S.2d at 830-31 (finding that service for the divorce action was defective because Germany filed an objection to Article 10 when it ratified the treaty).

¹⁹² The expediency contemplated by the Hague Convention and ICARA may be at odds with state and federal rules of civil procedure, which impose time frames that may prevent the prompt disposition of a Hague petition. For example, the Hague Convention and ICARA regulations state that a petition should be decided within six weeks. See Hague Convention, *supra* note 1, ch. III, art. 11, T.I.A.S. No.11,670, at 7, 22514 U.N.T.S. at 100; 22 C.F.R. §§ 94.6(i), 94.7(b). State and federal rules of civil procedure however, proscribe time frames that may extend a proceeding beyond six weeks. See FED. R. CIV. P. 12(a)(1)(A) (twenty days to answer a petition); N.Y. CIV. PRAC. L. & R. 3012 (twenty to thirty days to answer depending on manner of service); FED. R. CIV. P. 30 - 34; and Article 31 of N.Y. CIV. PRAC. L. & R. on disclosure. The time frames imposed by state and federal rules governing habeas corpus applications, on the other hand, comport with the expedient decision-making contemplated by the Hague Convention and ICARA. See FED. R. CIV. P. 81(a); Article 70 of N.Y. CIV. PRAC. L. & R.

¹⁹³ The authority for a hearing derives from ICARA which prohibits a court from removing a child from a person's physical custody without satisfying applicable state laws. ICARA, 42 U.S.C.A. § 11604 (b). New York's applicable statute, the UCCJA, requires an opportunity to be heard in custody proceedings. DRL § 75-e.

¹⁹⁴ See National Child Search Assistance Act of 1990, 42 U.S.C.A. § 5779 (1995) (requiring federal, state, and local law enforcement authorities to report missing children to the National Crime Information Center of the U.S. Justice Department; criminal charges not necessary to file a missing person report with the National Crime Information Computer Center); Missing Children's

the respondent fails to appear with the child, a warrant in lieu of the writ should be issued permitting the authorities to bring the child before the court without the respondent. If the respondent still fails to appear, the petitioner should be granted temporary custody pending the respondent's appearance. If, once again, the respondent fails to appear, the court should proceed to dispose of the petition. This procedure provides the respondent with ample opportunity to produce the child and answer the petition¹⁹⁵ in a manner that is consistent with the dictates of our federal constitution.¹⁹⁶

V. COSTS

The Central Authorities and public service agencies associated with the Hague Convention bear the costs of implementing the Convention.¹⁹⁷ They may not impose upon petitioners, related parties, or each other, any costs related to

Assistance Act of 1984, 42 U.S.C.A. §§ 5771, 5773(b) (1995) (establishing the National Center for Missing and Exploited Children); National Child Search Assistance Act of 1990, 42 U.S.C.A. § 5780 (1995) (prohibiting local authorities from imposing waiting periods and requires immediate entry of missing child report); Missing Children Act of 1982, 28 U.S.C.A. § 534(a) (1993) (authorizing description of missing children to be entered into the National Crime Information Computer Center by local law enforcement and/or the FBI). The petitioner may also ask the State Department to enter the abducted child's name in the passport registry. This enables the State Department to notify the petitioner if an application for a U.S. passport has been received anywhere in the U.S. or at any U.S. Embassy or Consulate abroad. A petitioner may contact the U.S. Office of Passport Policy and Advisory Services in Washington, D.C.

¹⁹⁵ See *Brooke v. Willis*, 907 F. Supp. 57, 62-63 (S.D.N.Y. 1995).

¹⁹⁶ See *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.").

¹⁹⁷ Hague Convention, *supra* note 1, ch. V, art. 26, T.I.A.S. No. 11,670, at 11, 22514 U.N.T.S. at 102; ICARA, 42 U.S.C.A. § 11607(a); 22 C.F.R. § 94.4(a).

petition processing, or, where applicable, to charges that have arisen from the Central Authorities' own legal counsel or advisers.¹⁹⁸ The Central Authorities may, however, require reimbursement for expenses incurred or to be incurred in implementing a child's return.¹⁹⁹ Any form of security, bond, or deposit may not be requested by the petitioner or the Central Authority to guarantee payment of the cost of administrative or judicial proceedings.²⁰⁰

As stated earlier, the U.S. Central Authority provides no legal representation, nor does it cover court costs or transportation fees for the child and the person accompanying the child.²⁰¹ Petitioners must bear these costs unless the costs are covered by federal, state, or local legal assistance programs.²⁰² The petitioner, however, may be able to recover these costs from the respondent. If the respondent refuses to return the child voluntarily, the courts must levy not only the costs of legal counsel and court proceedings upon the respondent, but transportation costs incurred in the child's return and the costs of foster care or any other type of care necessary for the child during the proceedings.²⁰³ These costs are to be levied unless the respondent establishes that the imposition of

¹⁹⁸ Hague Convention, *supra* note 1, ch. V, art. 26, T.I.A.S. No. 11,670, at 11, 22514 U.N.T.S. at 102.

¹⁹⁹ *Id.*

²⁰⁰ Hague Convention, *supra* note 1, ch. V, art. 22, T.I.A.S. No. 11,670, at 10, 22514 U.N.T.S. at 102.

²⁰¹ See *supra* note 38 and accompanying notes.

²⁰² ICARA, 42 U.S.C.A. § 11607(b)(1)-(2); see Hague Convention, *supra* note 1, ch. V, art. 26, T.I.A.S. No. 11,670, at 11, 22514 U.N.T.S. at 102, ch. VI, art. 42, T.I.A.S. No. 11,670, at 15, 22514 U.N.T.S. at 104 (stating that a signatory may make a reservation that it shall not be responsible for legal fees and the cost of court proceedings except as covered by legal aid).

²⁰³ Hague Convention, *supra* note 1, ch. V, art. 26, T.I.A.S. No. 11,670, at 11, 22514 U.N.T.S. at 102; ICARA, 42 U.S.C.A. § 11607(b)(3); see *Currier v. Currier*, No. CIVIL 94-99-M, 1994 WL 392606, at *2 (D.N.H. Jul. 29, 1994) (finding that prevailing party entitled to reimbursement of expenses incurred in obtaining relief); *Grimer v. Grimer*, 1993 WL 545261, at *2 (D. Kan. Dec. 8, 1993) (ordering respondent to pay attorney fees, costs, and expenses).

these costs "would be clearly inappropriate."²⁰⁴ The U.S. Central Authority may also, on behalf of the petitioner, recoup, from the respondent, its outlays in executing a child's return.²⁰⁵

With respect to visitation petitions, the court may order the custodial parent or person who prevented the exercise of access rights to pay necessary expenses incurred by or on behalf of a petitioner.²⁰⁶ "Necessary expenses" may include transportation and legal costs.²⁰⁷ The Massachusetts court in *Viragh v. Foldes*²⁰⁸ has held, however, that attorney fees may not be awarded "to a party who successfully petitions for rights of access," but who does not succeed in having the child returned for the purposes of visitation under Article 18 of the Convention.²⁰⁹ The court based its decision upon section 11607(b)(3) of ICARA, which states that any court ordering the return of a child pursuant to an action under section 11603 of ICARA may order a respondent to remit necessary expenses.²¹⁰ Since a child was not ordered to be "returned," the court reasoned that attorney fees could not be awarded.²¹¹

Section 11603(b), however, permits the commencement of a civil action to secure the exercise of visitation rights, not just a child's

²⁰⁴ ICARA, 42 U.S.C.A. § 1607(b)(3). See *Rydder v. Rydder*, 49 F.3d 369, 373 (8th Cir. 1995) (finding the award of fees and legal costs to petitioner excessive in light of respondent's financial circumstances).

²⁰⁵ The Central Authority may recover costs incurred in executing the return of a child, as permitted under Article 26, although Article 28, which empowers the Central Authority to require the petitioner to authorize it to act on the petitioner's behalf. Hague Convention, *supra* note 1, ch. V, art. 26, T.I.A.S. No. 11,670, at 11, 22514 U.N.T.S. at 102, ch. V, art. 28, T.I.A.S. No. 11,670, at 12, 22514 U.N.T.S. at 103.

²⁰⁶ Hague Convention, *supra* note 1, ch. V, art. 26, T.I.A.S. No. 11,670, at 11, 22514 U.N.T.S. at 102 ("[T]he judicial or administrative authorities may, where appropriate, direct the person . . . who prevented the exercise of rights of access, to pay necessary expenses . . . including . . . the costs of legal representation of applicant and those of returning the child.").

²⁰⁷ *Currier*, 1994 WL 392606, at *1; *Grimer*, 1993 WL 545261, at *2.

²⁰⁸ 612 N.E.2d 241 (Mass. 1993).

²⁰⁹ *Id.* at 250.

²¹⁰ *Id.*

²¹¹ *Id.*

return.²¹² Furthermore, the United States did not enter any reservations excluding the award of attorney fees in visitation proceedings when it ratified the Convention.²¹³ The only reservation concerning expenses refers to the U.S. Central Authority's nonpayment of a petitioner's legal fees and court costs.²¹⁴ Other than these reservations, the United States is bound by the Convention's mandate, which permits the award of attorney fees to petitioners who successfully invoke the exercise of visitation rights under the Convention.²¹⁵

VI. ALTERNATIVES TO UTILIZING THE CONVENTION

As discussed earlier, the Parental Kidnapping Prevention Act of 1980 and the International Parental Kidnapping Act of 1993 do not

²¹² 42 U.S.C.A. § 11603(b). This section provides in pertinent part: "Any person seeking to initiate judicial proceedings . . . may do so by commencing a civil action"

²¹³ See Hague Convention, *supra* note 1, ch. VI, art. 42, T.I.A.S. No. 11,670, at 15, 22514 U.N.T.S. at 104 (providing signatories may enter reservations to the Convention).

²¹⁴ Hague Convention, *supra* note 1, T.I.A.S. No. 11,670, at 2, Proclamation by the President of the United States, (providing that the only reservations to the treaty are as follows: (1) "All applications, communications and other documents sent to the U.S. Central Authority should be accompanied by their translations into English"; and (2) "[T]he United States declares that it will not be bound to assume any costs or expenses resulting from the participation of legal counsel or advisers or from court and legal proceedings in connection with efforts to return children from the United States pursuant to the Convention except as insofar as those costs or expenses are covered by a legal aid program"). For a full discussion on how reservations made by signatories have caused problems in implementing the Convention, see Susan Mackie, Comment, *Procedural Problems in the Adjudication of International Parental Child Abduction Cases*, 10 TEMP. INT'L & COMP. L.J. 445 (1996).

²¹⁵ Hague Convention, *supra* note 1, ch. V, art. 26, T.I.A.S. No. 11,670, at 11, 22514 U.N.T.S. at 102; see RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 321 (1986) (providing "[e]very international agreement in force is binding upon the parties to it and must be performed by them in good faith.").

offer any assistance for a parent whose child was abducted from a foreign nation and taken to New York. That parent may find relief, however, under the UCCJA.²¹⁶ If a child has been abducted from a foreign nation and taken to New York, the aggrieved parent can attempt to enforce a foreign custody decree in the New York courts under the UCCJA if the decree was issued by a legal institution similar in nature to those in the United States and all interested parties received reasonable notice and an opportunity to be heard.²¹⁷ Upon enforcement, an order to return the child to the aggrieved parent may be entered.²¹⁸ This option is limited, however, because unlike the Hague Convention, it is predicated upon a pre-existing custody decree and may be effective only in situations where the child is abducted to the United States. In situations where the child is taken from the United States, a custody decree issued pursuant to the UCCJA is effective only if the abducted-to country recognizes the decree or requests the decree in the form of an Article 15 Hague determination.²¹⁹ Unlike the Convention, which seeks only to restore actual physical custody of the child to the non-abducting parent, the UCCJA seeks to restore legal custody status pursuant to New York law, which other nations need not recognize.

A more drastic alternative is re-abduction of the child from New York to the child's habitual residence. Aggrieved parents will most likely consider this measure when the child's habitual residence is not a party to the Convention, an extradition treaty does not exist between the subject countries, or an exception to returning the child has been successfully invoked in a petition proceeding. Re-

²¹⁶ See *supra* note 27 and accompanying text.

²¹⁷ DRL § 75-w. See *Zwerling v. Zwerling*, 167 Misc.2d 782, 790, 636 N.Y.S.2d 595, 601 (Sup. Ct. Queens County 1995) (holding that the court recognized Israeli custody decree on the grounds that the Israeli legal institutions were similar to those in New York and both parties had received notice and an opportunity to be heard).

²¹⁸ See generally DRL § 75. See also DLR § 75-b(1)(g) (listing as one of the purposes of this section as "to facilitate the enforcement of custody decrees of other states.").

²¹⁹ See *supra* notes 76 – 85 and accompanying text.

abduction, however, would only violate the IPKA and other applicable state and local laws, possibly resulting in criminal prosecution. The United States can request extradition of the abducting parent for criminal prosecution if an extradition treaty exists between the United States and the country involved.²²⁰ Re-abduction also does not lead to any permanent resolution of the custody situation. Abduction and re-abduction only prolongs the child's legal and emotional state of uncertainty and further disrupts the child's emotional, psychological, and in some cases, physical well-being.

VII. CONCLUSION

The Hague Convention does not determine or restore a parent's legal custody over a child that has been internationally abducted. It restores only actual physical custody. Legal custody is to be settled by the courts in the country of the child's habitual residence. Only the signatory to which the child was abducted can mandate the return of the child.

As international abductions increase and with New York State as one of the many possible destinations for the parental abductor and the abducted child, it is important for aggrieved parents, legal practitioners, and the judiciary of New York State to become more aware of the Hague Convention and the relief it provides in obtaining either the return of one's child abducted to New York, or access to one's child residing in New York.

²²⁰ See U.S. Dep't of State, Bureau of Consular Affairs, *International Parental Abduction* 15 (1995) (stating that extradition can be achieved through INTERPOL, an international link between law enforcement authorities in member nations to apprehend fugitives).

